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Long-term programme of work

Possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments

Working paper prepared by the Secretariat

Addendum

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I. Introduction

1. At the sixty-sixth session of the International Law Commission, the Working Group on the Long-term Programme of Work identified a need to conduct a systematic review of the work of the Commission and a survey of possible future topics for its consideration. Bearing in mind both the view of the Working Group and the fact that an illustrative general scheme of topics was last developed in 1996,[1] the Commission requested the Secretariat to: (a) review the list of topics established in 1996 in the light of subsequent developments and (b) prepare a list of potential topics, accompanied by brief explanatory notes, by the end of the present quinquennium.[2] The request was made on the understanding that the Working Group would continue to consider any topics that members may propose.[3]

2. At the sixty-seventh session of the Commission, the Secretariat prepared a working paper reviewing the 1996 general scheme, both retrospectively and prospectively, which addresses the first aspect of the Commission's request (A/CN.4/679).

3. The present addendum focuses on the second aspect of the Commission's request. It contains a list of six potential topics, accompanied by brief explanatory notes, consistent with the request by the Commission. The explanatory notes provide a short introduction and background, a brief survey of existing practice and a short bibliography, with footnotes being kept to a minimum for the sake of brevity. The addendum also contains an annex reflecting, in tabular form, the list of proposals and suggestions for possible future topics made over the years, based on the working paper (A/CN.4/679). It is from that list of proposals, including a combination thereof, that the six potential topics outlined below have been selected.

II. List of potential topics accompanied by brief explanatory notes

4. The following six topics are proposed for consideration by the Commission:

(a) General principles of law;

(b) International agreements concluded with or between subjects of international law other than States or international organizations;

(c) Recognition of States;

(d) Land boundary delimitation and demarcation;

(e) Compensation under international law;

(f) Principles of evidence in international law.

5. The topics are proposed bearing in mind the criteria of the Commission in the selection of topics for inclusion in its long-term programme of work, namely the needs of States, sufficiency and advancement of State practice, feasibility and

[1] *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), annex II.

[2] *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 10* (A/69/10), para. 271.

[3] Ibid.

concreteness. The Commission has also expressed a willingness not to restrict itself to traditional topics, but to consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[4] The background to the suggested topics varies. In some instances, the Commission has addressed the topic or variations thereof before, while in other instances the proposal or the suggestion has been made in the course of its work, without further elucidation. "Recognition of States" and "Land boundary delimitation and demarcation" fall in the former category, while the other four topics proposed are largely in the latter.

6. The presentation of the topics, together with the annex, follows the structure of the *Analytical Guide to the Work of the International Law Commission, 1949-1997*, as updated on the website of the Commission.[5] Two topics relate to "sources of international law" and the remaining four topics relate, respectively, to "subjects of international law", "law of international spaces", "law of international relations/responsibility" and "settlement of disputes". If any of the topics were to be selected for consideration by the Commission, it would, of course, be for the Commission to determine how it wishes to approach the topic. The suggestions made in the explanatory notes that follow are primarily intended to identify possible courses of action available to the Commission.

A. General principles of law

7. General principles of law are one of the three sources of international law identified in Article 38, paragraph (1), of the Statute of the International Court of Justice.[6] The other two sources listed in that paragraph, treaties and customary international law, are more clearly defined and developed in international practice. General principles of law, by comparison, remain less clear in scope and are more cautiously applied by international courts and tribunals, in particular the International Court of Justice.

8. The wording of Article 38, paragraph (1) (c), of the Statute of the Court "the general principles of law recognized by civilized nations", is the same as that of Article 38, paragraph (3), of the Statute of the Permanent Court of International Justice. That provision had been the subject of some debate among the members of the Advisory Committee of Jurists who drafted it, particularly regarding the possibility of transposing principles found in national legal systems directly to

[4] *Yearbook ... 1998*, vol. II (Part Two), p. 10, para. 553. The Commission has stated that (a) the topic should reflect the needs of the States in respect of the progressive development and codification of international law; (b) the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; (c) the topic is concrete and feasible for progressive development.

[5] *Analytical Guide to the Work of the International Law Commission, 1949-1997*, ST/LEG/GUIDE/1 (New York, United Nations 1998), available from http://legal.un.org/ilc/guide/gfra.shtml.

[6] A number of references to general principles of law as a source of international law can be found in arbitral decisions predating the Statutes of the Permanent Court of International Justice and the International Court of Justice. See, e.g., the arbitration between France and Venezuela in the 1905 *Antoine Fabiani* case, which defines these principles as "the rules common to most legislations or taught by doctrines", United Nations, *Reports of International Arbitral Awards*, vol. X, p. 83 at p.117.

international law.[7] That early uncertainty, and similar doubts and difficulties, continue to underlie the identification and application of this source of international law. In addition, general principles of law have not always been clearly distinguished from other sources of international law, and the term has sometimes been used to include general principles of international law.[8]

9. The Commission has not studied general principles of law in depth, but has made a number of references to them in the course of its work. In its 1949 Survey of International Law, the Commission stated that Article 38 of the Statute of the International Court of Justice had successfully codified the sources of international law, and acknowledged that general principles of law are one of the three principal sources to be applied by the Court.[9] The Commission has subsequently frequently considered general principles of law in the context of other topics, but has not examined them as a source of international law as such.[10] For example, it has considered general principles with regard to territorial sovereignty in the context of its consideration of possible limitations thereto in the 1971 review of its long-term programme of work,[11] and in relation to force majeure in the context of its work on State responsibility.[12]

10. Frequent recourse to general principles of law can be found in the practice of States and in international jurisprudence. Although the case law of the Permanent Court of International Justice and the International Court of Justice has referred to general principles of law only on limited occasions, other courts and tribunals, in particular international criminal tribunals, arbitral tribunals and regional courts, have more frequently used this source of international law in their jurisprudence. Recourse to general principles of law has been especially prominent in relation to procedural, criminal and commercial matters.

11. The reference in Article 38(1)(c) of the Statute of the International Court of Justice to general principles of law that are "recognized by civilized nations" anchors this source of international law in the domestic laws of States and distinguishes such principles from general principles of international law or moral principles.[13] However, this distinction has not always been clearly maintained in the case law and the literature. Moreover, the method of identification of general principles of law has not been developed to the same extent or with the same clarity as treaty and customary rules. International jurisprudence and scholarship suggest that identifying the substance of the general principles of law may be a very broad-ranging and far-reaching task. Accordingly, the Commission may wish to consider instead an approach similar to that being taken in relation to the topic "identification

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[7] See Giorgio Gaja, "General Principles of Law", *Max Planck Encyclopedia of Public International Law*, available at: www.mpepil.com. See also Vladimir-Djuro Degan, "General Principles of Law (A Source of General International Law)", *Finnish Yearbook of International Law*, vol.3 (1992), pp. 1-102.

[8] See A/CN.4/659 (observation 30).

[9] *Survey of International Law in relation to the Work of Codification of the International Law Commission*, A/CN.4/1/Rev.1, para. 33.

[10] See, e.g., A/CN.4/1/Rev.1, paras. 36, 45, 49 and 71; A/CN.4/245, paras. 244, 300 and 412. See also A/CN.4/659, observation 30, p. 36, and related footnotes 135 and 136.

[11] A/CN.4/245, para. 50.

[12] A/CN.4/315, para. 9.

[13] Pellet, A., "Article 38" in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm (eds.) *The Statute of the International Court of Justice: A Commentary* (Oxford, Oxford University Press, 2006), p. 767, para. 252.

of customary international law", that is, to seek to provide practical guidance on the way in which the existence and content of general principles of law are to be determined.

12. If the Commission wishes to pursue such an approach, it might analyse the consideration that has been given to general principles of law by international courts and tribunals and seek to identify the various issues that underlie the application of Article 38(1)(c) of the Statute. While the debate surrounding the problematic reference to "civilized" nations is now largely settled, the case law and literature[14] suggest a number of remaining issues, for example: the difficulty of identifying general principles of law among the large number of States and variety of legal systems; the inherently general nature of any such principles of law; their transposability to the international level; the role often ascribed to general principles of law as "filling the gaps" in other sources of international law; how general principles of law relate to the consensual nature of international law; and how general principles of law relate to general principles of international law and the other sources of international law.

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[14] Ibid., p. 766.

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B. International agreements concluded with or between subjects of international law other than States or international organizations

13. The question of international agreements concluded with or between subjects of international law other than States or international organizations is a matter that the Commission left open in its treatment of the law of treaties.[15] There is increasing evidence that entities other than States and international organizations established by States may be subjects of international law.[16] However, there is no shared understanding as to which entities are subjects of international law. Furthermore, there is disagreement as to which such entities have the legal capacity to enter into agreements that are legally binding under international law, either between themselves or with States and/or international organizations. Nonetheless, agreements concluded by non-State actors exist in contemporary international practice.[17]

14. In its commentaries to the draft articles on the law of treaties, the Commission took the position that the "other subjects of international law", mentioned in what became article 3 of the 1969 Vienna Convention on the Law of Treaties, were

[15] Article 3, Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331 and article 3, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986, A/CONF.129/15 (not yet in force).

[16] As mentioned below, the Commission itself recognized as such in its commentaries to the draft articles on the law of treaties: *Yearbook ... 1962*, vol. II, p. 162, doc. A/5209, chap. II, sect. II. A/CN.4/245, para. 262-266. More generally, see, e.g., C. Walter, "Subjects of International Law", *Encyclopedia ...*, available at: www.mpepil.com, and M. Noortmann, A. Reinisch and C. Ryngaert (eds.) *Non-State Actors in International Law* (Oxford, Hart, 2015).

[17] For a typology, see e.g., Y. Le Bouthillier and J.-F. Bonin, "International agreements between subjects of international law other than States" in Corten, O. and Klein, P., *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I (Oxford, Oxford University Press, 2011), pp. 71-76, and Grant, T. "Who Can Make Treaties? Other Subjects of International Law", in Hollis, D. B. (ed.), *The Oxford Guide to Treaties* (Oxford, Oxford University Press, 2012), pp. 125-149.

international organizations, the Holy See, and "other international entities, such as insurgents, which may in some circumstances enter into treaties".[18] Moreover, the Commission understood the phrase "other subjects of international law" as "primarily intended to cover international organizations, to remove any doubt about the Holy See and to leave room for more special cases such as an insurgent community to which a measure of recognition has been accorded".[19] However, according to the Commission, the phrase did not include "individuals or corporations created under national law, for they do not possess capacity to enter into treaties nor to enter into agreements governed by public international law".[20]

15. The Commission has already addressed the law of treaties between States and international organizations or between international organizations. It may be useful for the Commission to clarify the regime applicable to international agreements concluded with or between subjects of international law other than States or international organizations.

16. The extent to which the legal capacity to enter into international agreements is now recognized for corporations and other possible subjects of international law beyond "insurgent communities", including indigenous peoples and non-governmental organizations, remains a matter of debate.

17. While foreign corporations have entered and continue to enter into a multiplicity of binding agreements with States, the extent to which these agreements are governed by international law is also a matter of doctrinal difference.

18. Furthermore, there is practice of armed groups entering into written agreements with States in the context of peace negotiations, sometimes participating in internationalized political processes involving the United Nations or third States, even without being formally recognized as insurrectional movements.[21] States have also entered into agreements with other entities, including the International Committee of the Red Cross, indigenous peoples, federal entities belonging to other States, or non-self-governing territories. The practice in this regard is varied and the legal classification of these agreements would certainly benefit from examination and clarification.

19. Article 3 of the Vienna Convention on the Law of Treaties left open the question of the legal force of such agreements and the application of any other rules of international law, independently of the Convention. A virtually identical provision is included in article 3 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which explicitly envisages that there could be "international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or organizations are parties". Moreover, it provides that the exclusion of such agreements from the scope of application of the Convention shall not affect their "legal force" and the

[18] *Yearbook ... 1962*, vol. II, p. 162, doc. A/5209, chap. II, sect. II, A/CN.4/245, para. 262-266.
[19] Ibid., p.164.
[20] Ibid., p. 162.
[21] See article 1, para. 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), 8 June 1977, United Nations, *Treaty Series*, vol. 1125, No. 17513, p. 609; the term "insurrectional movement" reflects the language of article 10 of the articles on the responsibility of States for internationally wrongful acts, *Yearbook ..., 2001*, vol. II, Part Two, p. 39.

application of "the rules set forth" in the Convention by virtue of rules independent thereof.

20. In undertaking a study of this area of the law, the Commission might wish to decide on which "other subjects of international law" to focus its work, bearing in mind that the Commission had taken the position that the reference to "subjects of international law other than States or [international] organizations" was "far narrower in scope [than the term "entity"] and the area of discussion which it opens up is very limited".[22] In any event, the Commission may wish to examine which of the rules of the two Vienna Conventions would suitably operate in relation to the agreements in question, as well as identify those aspects of the Conventions that would be inapplicable. The Commission might wish to consider such overarching rules relating to treaty law as those concerning methods of conclusion, interpretation, *pacta sunt servanda* and non-invocation of internal law. It could also identify such other rules as would apply to those agreements independent of the Vienna Conventions. Such a study may also be a useful step in any future consideration of other aspects, including the international responsibility of non-State actors for internationally wrongful acts, as well as the related question of the responsibility of States or of international organizations towards non-State actors, which was left open by articles 33 (2) of the Commission's 2001 articles on the responsibility of States for internationally wrongful acts and 2011 articles on the responsibility of international organizations.

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C. Recognition of States

21. The role of recognition in the ascertainment of statehood has been a matter of some contemplation over the years. In 1949, the recognition of States was included among the topics selected by the Commission for codification,[23] on the basis of the 1949 survey. The premise for its inclusion was that the topic was "... from the practical point of view, one of the most important questions of international law".[24]

22. The Commission has yet to take up the subject. A key stumbling block to its consideration has been the lingering perception that the topic is, by its nature, too political to be susceptible to codification.[25] Such concerns were evident already

[23] *Yearbook* ..., 1949, para. 16.
[24] A/CN.4/1/Rev.1, para. 40.
[25] A proposal for the consideration of the topic was last made in the late 1990s. See the discussion in A/CN.4/679, para. 20.

when the proposal was made in 1949.[26] Nonetheless, as was noted in the 1949 survey:

> "...[such a] view is contrary to the evidence of international practice — governmental and judicial — and that if acted upon it is probably inconsistent with the authority of international law and its effectiveness in one of the most crucial manifestations of the international relations of States. It would seem inconsistent with the authority of international law that the question of the rise of statehood and the capacity of States to participate in international intercourse should be regarded as a matter of arbitrary discretion rather than legal duty."[27]

23. Concerns as to the impact of extra-legal considerations have not prevented the Commission from dealing with, or referring to, certain aspects of the topic on a number of occasions. For example, the Commission contemplated including a provision on recognition in its draft declaration on rights and duties of States, adopted in 1949.[28] The recognition of States was also referred to, even if somewhat tangentially, during the consideration of the topics "law of treaties", "special missions" and "relations between States and international organizations".[29] It arose again most recently in the context of the work on the topic "reservations to treaties".[30] In each case, in declining to pursue a fuller examination of the effect on the matter at hand of the rules applicable to recognition, the Commission, to varying degrees, also hinted at the possibility of an eventual study of the topic as a whole.

24. The question of recognition of States continues to be topical and a subject of contemporary relevance. With the emergence of more States in the decades since the 1949 survey, there has been a wealth of practice and developments in the law, including outside the special situation of decolonization. In the 1971 survey of international law, it was said: "that the subject has continued to be of importance, and indeed, in a society composed largely of independent States, it appears unlikely that the act of recognition could cease at any time to be of significance in international relations".[31]

25. The 1949 survey listed the following as possible legal questions to be considered: "the requirements of statehood entitling a community to recognition; the legal effects of recognition (or of non-recognition) with regard to such matters as jurisdictional immunity, State succession, diplomatic intercourse; the admissibility and effect, if any, of conditional recognition; the question of the retroactive effect of recognition; the modes of implied recognition; the differing legal effects of

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[26] A/CN.4/1/Rev.1, para. 42 ("[t]he main reason for the inability — or reluctance — to extend the attempts at codification to what is one of the central and most frequently recurring aspects of international law and relations has been the widely held view that questions of recognition pertain to the province of politics rather than of law.").

[27] Ibid.

[28] See A/CN.4/245, para. 60.

[29] Ibid., paras. 61-63.

[30] Draft guideline 1.5.1 excluded from the scope of application of the draft guidelines the ancillary matter of statements of non-recognition, involving the indication by a State that its participation in a treaty did not imply recognition of an entity which it does not recognize. Such position was "guided by the fundamental consideration that the central problem here is that of non-recognition, which is peripheral to the right to enter reservations". Para. (13) of the commentary to draft guideline 1.5.1, *Official Records of the General Assembly on the work of its Sixty-sixth Session, Supplement No. 10, Addendum* (A/66/10/Add.1).

[31] A/CN.4/245, para. 65.

recognition de facto and de jure; the legal consequences of the doctrine and practice of non-recognition; and last — but not least — the province of collective recognition".[32] Further preliminary questions raised in the 1949 survey related to the relationship with the question of the recognition of governments and of belligerency within the scope of the topic.

26. With the addition of the legal effect of collective "non-recognition", the list of issues remains, by and large, apposite. Furthermore, a contemporary analysis would necessarily require taking into account the legal effects of the operation of the Charter of the United Nations, as well as of major pronouncements of principles of international law, such as those contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[33] and recent case law. It might be more difficult to avoid entirely a consideration of at least some aspects of the recognition of governments, than excluding the question of belligerency, which might best be the subject of separate consideration.

27. Moreover, the 1971 survey suggested a further refinement in approach by proposing that the Commission could adopt a basic distinction between the nature of the act of recognition and the legal consequences flowing therefrom.[34] Such an approach might be feasible, thereby restricting the consideration of the former (perhaps to possible limitations existing under international law on the freedom to recognize) while focusing primarily on the latter.

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[32] A/CN.4/1/Rev.1, para. 42.

[33] General Assembly resolution 2625 (XXV) of 24 October 1970.

[34] A/CN.4/245, para. 66 ("[a] distinction may perhaps be usefully drawn, however, between the basic act of recognition itself and elements of its application or implementation.").

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D. Land boundary delimitation and demarcation

28. Territorial delimitation concerns the definition of a land boundary between two or more States, designating the spatial limits of their sovereignty. Stable and final land boundaries are fundamental for peaceful relations between neighbouring States. Clarification of the rules, principles and methods governing territorial delimitation would assist States willing to proceed to such a delimitation of their land boundaries and, in case of a dispute, would guide them in its peaceful settlement.

29. The determination of a land boundary generally involves several phases, primarily delimitation and demarcation. As indicated by the International Court of Justice, the delimitation of a boundary consists in its "definition", whereas the demarcation of a boundary, which presupposes its prior delimitation, consists of operations marking it out on the ground. While questions of the definition of a land boundary (i.e. territorial delimitation) are formally distinct from issues relating to sovereignty of the land (i.e. title to territory), they are closely related insofar as the latter determines the former and both would eventually result in the definition of a boundary line. The effect of any delimitation is an apportionment of the areas of land lying on either side of such a line. Demarcation is the final step consisting in the technical operations marking the boundary line out on the ground, an operation which may be followed by placing physical boundary points along the border.

30. The broader topic of "the territorial domain of States" was raised in the 1949 and 1971 surveys, which have acknowledged the importance of the matter for States and the significant existing State practice. As defined in those surveys, the topic addressed a large range of questions relating to modes of acquisition of territory, as well as questions concerning specific limitations on the exercise of territorial sovereignty. On those occasions, the Commission did not take up the topic, as it was not considered suitable for immediate codification in comparison with other topics.

31. Since the 1949 and 1971 surveys, new States have emerged, continuing to raise a number of issues regarding the definition of borders. Furthermore, a number of territorial disputes have been submitted to international courts and tribunals, in particular to the International Court of Justice, resulting in the growth of case law covering the legal aspects of the matter. The practice of States and the jurisprudence of international courts and tribunals on the matter are relatively well-established. Moreover, technological developments have given rise to new methods of delimitation and demarcation and it would be useful to clarify the legal implications of these novel techniques.

32. In contrast with the broad range of issues raised in previous surveys, the Commission could address a narrower subset of issues, limited to the legal principles applicable to land boundary delimitation and demarcation, to guide and assist Governments in dealing with those matters. Such an approach would be restricted to the existing legal principles applicable to the technical operations of delimitation and demarcation. A considerable amount of State practice exists, which is supplemented by a number of decisions of international courts and tribunals. The case law has addressed a large range of issues relating to territorial title, including evidence of such title, *effectivités* (the effective exercise by a State of territorial jurisdiction on a territory), as well as their relationship with title.

33. In the case law concerning land boundary disputes, a number of questions have been considered relating, inter alia, to the concept of territorial sovereignty, the different categories of title, including matters concerning the validity of colonial title or the principle of *uti possidetis juris*, the legal regime of boundary treaties, as well as issues relating to evidence of legal title, such as the evidentiary value of maps or Government publications. In addition, the case law has clarified the relevance and legal consequences of the exercise of effective authority, and qualified specific conduct by States as evidence of the establishment of sovereignty over a territory. Moreover, the role of equity, in its different forms, in territorial delimitations has been developed. Furthermore, the case law has addressed the effects of recognition, acquiescence, tacit agreements or estoppel. The relationship between delimitation and demarcation has also been considered and could be further clarified.

34. On the whole, the topic would set forth the principles of territorial delimitation and demarcation, as they have been defined and clarified by State practice and international courts and tribunals. The Commission could affirm the fundamental principles according to which neighbouring States are free to agree on a common boundary and that, in case of a dispute, any existing title prevails over any "*effectivités*". The Commission could also explore other relationships between titles and *effectivités* and the role of equity, in particular *infra legem*. The Commission could also address the legal questions informing the technical task of demarcation.

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E. Compensation under international law

35. A State responsible for an internationally wrongful act is under an obligation to make full reparation for the injury caused. This fundamental principle is based on well-established case law and was codified by the Commission in article 31 of the 2001 articles on the responsibility of States for internationally wrongful acts. Article 36 singles out compensation as one form of reparation.[35]

36. While States often prefer compensation to other forms of reparation, the 2001 articles provide only limited guidance on the quantification of compensation. It is noted that the 2001 articles, and corresponding commentaries, discuss causation in a general manner. Causation is a fundamental requirement in the determination of damages in international law. A responsible State has to make reparation only for the injury caused by the internationally wrongful act. Moreover, it has been difficult to choose the appropriate method to assess the capital value of assets taken or destroyed (*damnum emergens*). The competing methods to evaluate the "fair market value" of such assets include the asset value or replacement cost, the comparable transactions approach, the alternative options approach, and the discounted cash flow approach. It also remains challenging to establish the loss of foreseeable profits (*lucrum cessans*) without including speculative benefits.[36] In addition, recent judicial practice has seen a convergence around the award of compound interest — an issue that has been left open in the articles.[37]

[35] The 2001 articles refer to the term "compensation", which is often used interchangeably with "damages" in practice and scholarship.

[36] Marboe, I., *Die Berechnung von Entschädigung und Schadensersatz in der internationalen Rechtssprechung* (Frankfurt am Main, Peter Lang, 2009); and Wälde, T. W. and Sabahi, B. "Compensation, Damages and Valuation in International Investment Law", *Transnational Dispute Management*, vol. VI (2007), pp. 1-64.

[37] *Yearbook ... 2001*, vol. II (Part Two), pp. 108-109.

37. The quantification of compensation is an important and complex topic in the law of international responsibility. Special Rapporteur Gaetano Arangio-Ruiz, in his second report, discussed "reparation by equivalent" in considerable detail.[38] In 1992, the Commission decided to adopt the shorter version of the two draft articles proposed by the Special Rapporteur in the form of draft article 44. While adding draft article 38 on interest on second reading, Special Rapporteur James Crawford supported the "flexible and general" approach of the Commission.[39] He observed that little recent case law existed outside the field of diplomatic protection, and that most case law on quantification had arisen in relation to the primary obligation of compensation for expropriation. At the same time, however, he recognized that the law on compensation was "notably dynamic" and undergoing development in the practice of different international courts and tribunals.[40]

38. Since the adoption of the 2001 articles, the case law of international courts and tribunals concerning the quantification of compensation has increased and diversified, making the topic sufficiently feasible and concrete for codification and progressive development. Some of this case law concerns inter-State claims, but many of the pertinent decisions address claims brought by natural persons or corporations. International courts and tribunals in fields such as human rights or the law of the sea have adopted relatively consistent approaches to quantifying compensation. This has been less so in international investment arbitration, which is generally characterized by a more varied practice. Nonetheless, arbitral tribunals have contributed considerably to the law on the quantification of compensation, for example, by innovatively applying standards of compensation for expropriation to non-expropriatory breaches of international law. Such developments illustrate both the need and the potential for a more general approach to the determination of quantum in the law of international responsibility.

39. In codifying and progressively developing pertinent rules, the Commission could rely on its earlier work on State responsibility, the responsibility of international organizations and diplomatic protection, as well as the practice of judicial and arbitral bodies in different fields of international law.

40. The rules on quantification might vary depending on the facts of the case and the primary obligation in question, possibly giving rise to *lex specialis*. Notwithstanding the existence of special rules, it may be possible to elucidate a number of applicable general rules and principles. In this regard, it is significant that the 2001 articles have had considerable influence in judicial practice.[41]

41. The Commission could consider the scope and content of the study on the basis of the available practice. Relevant legal questions regarding the quantification of compensation include: the distinction between factual causation and legal causation; concurrent causation and the allocation of compensation; the determination of applicable standards of compensation; the different methods to assess fair-market value, including their inter-relationships; the determination of lost profits; the choice of interest rate; and the application of simple interest and compound interest.

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[38] Ibid., *1989*, vol. II (Part One), p. 1, A/CN.4/425 and Corr.1 and Add.1 and Corr.1.
[39] Ibid., ... *2000*, vol. II (Part One), p. 3, A/CN.4/507 and Add.1-4, pp. 47-51.
[40] Ibid., pp. 49-50.
[41] A/62/62 and Corr.1 and Add.1, A/65/76, A/68/72.

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F. Principles of evidence in international law

42. International litigation has become a field of specialization in recent years. The number of international courts and tribunals has increased dramatically since the end of the Second World War, and they address an array of legal issues. In addition to the International Court of Justice, a variety of other courts and tribunals have addressed fact-finding and aspects of evidence under international law. These include international arbitral tribunals and international criminal courts and tribunals. The ascertainment of facts is also germane to commissions of inquiry. Such bodies have either adjudicated over disputes between States, between States and non-State actors, addressed situations of individual accountability, or ascertained facts and made findings in relation to a situation of interest to the international community. There now exists international legal practice on evidence in international litigation, arbitration and inquiries.

43. The purpose of evidence is to provide a court or tribunal with proof of certain facts.[42] It is axiomatic that the determination of such facts is an essential element of the judicial task,[43] as well as for any fact-finding exercise. This is so whether it is a matter before a domestic forum or an international one. Unlike the situation existing in national legal systems, however, international courts and tribunals have comparatively a greater degree of freedom in the determination of the procedure for the ascertainment of the facts underlying their decisions.[44]

44. Discussion in legal scholarship surrounding the law of evidence has been dominated by the adversarial and the inquisitorial approaches, respectively linked with the common law system and the civil law system.[45] Hitherto, the view among scholars has been that this was not a subject requiring sustained examination due to the perceived chasm that existed between the two systems.[46] However, in recent years, the subject has been studied and with respect to the international level, some work has been conducted by the Institut de droit international[47] and the British Institute of International and Comparative Law.[48]

45. The law of evidence in international law comprises a basic set of broad principles.[49] It has been said that the regime at the international level is characterized by the "generality, liberality and scarcity of its provisions".[50] A brief survey of the various practices shows that rules of procedure and evidence deal broadly with three areas which may require consideration: (a) the organizational aspects of evidentiary matters; (b) questions of proof; and (c) admissibility considerations.

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[42] Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law, 2009), p. 79.

[43] Ibid., p. 1.

[44] Ibid., p. 2.

[45] John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge, Cambridge University Press, 2012), p. 11.

[46] Ibid.

[47] Institut de droit international, Chittharanjan F. Amerasinghe, Rapporteur, *Principles of Evidence in International Litigation, Annuaire 2003*, pp. 139-398.

[48] See generally, Riddell and Plant, *Evidence before the International Court of Justice*, p. 2.

[49] Ibid.

[50] Ibid.

46. The organizational aspects address such matters as the rights and responsibilities of the parties, as well as the powers of a court or tribunal, including in the production, disclosure and withdrawal of evidence, whether documentary or testimonial. In addressing questions of proof, the key considerations include the distinction between burden of proof and burden of evidence (of persuasion); the application of the basic principle *actori incumbit onus probandi*; and difficulties associated with the application of the principle. The practice also address principles surrounding the presentation of pleadings and evidence, the duty of cooperation on the parties, the presumptions and inferences associated with proof and their effect on proof. The standard of proof has been another key aspect, together with associated matters not requiring proof (judicial notice, *jura novit curia* (the court knows the law)). As regards admissibility and use of evidence, implicated in the practice have been such issues as the general rule on admissibility and limitations thereto; principles relating to the submission of evidence; certification and assessment of evidence, as well as specific considerations concerning the admissibility of documentary and testimonial evidence. Other ancillary matters have concerned the advisory function of international courts.

47. Since the Commission's adoption of the text of the model rules on arbitral procedure in 1958,[51] it has not addressed procedural and evidentiary matters in a comprehensive manner. The various international courts and tribunals have rules and procedures that guide their work and are unique to their operations. A court or tribunal dealing with civil proceedings has rules and procedures that are distinct from those of a court or tribunal in criminal proceedings or of an arbitral procedure. The work of the commissions of inquiry is often informed by the different sources of their mandates, as well as the terms and conditions contained in the mandates relating to their establishment. The regimes involved are thus diverse. Accordingly, the consideration of the topic by the Commission would entail an elaboration of principles based on an analysis of an authoritative set of practices, procedures and techniques employed by international processes of a judicial nature, be they civil, criminal, arbitral or in relation to commissions of inquiry. The study of the topic would conceivably require separate treatment of practices involving civil proceedings, criminal proceedings, arbitral proceedings and fact-finding within commissions of inquiry.

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[51] *Yearbook ... 1958*, vol. II, para. 22.

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Annex

Proposals and suggestions for possible future topics[a]

A. Sources of international law[b]

(a) Sources of international law (1970)

(b) International agreements concluded with or between subjects of international law other than States or international organizations (1971)

(c) Question of participation in a treaty (1971)

(d) International agreements not in written form (1971)

(e) Multilateral treaty-making process (1979)

(f) Non-binding instruments (1996)

(g) Law applicable to resolutions of international organizations (1996)

(h) Control of validity of the resolutions of international organizations (1996)

(i) The role of international organizations in the formation of new rules of international law (1996)

(j) Legal effects of customary rules (1996)

(k) Development of norms of general international law (1996)

(l) Principle of *pacta sunt servanda* (including the implementation of international law) (1997)

(m) *Erga omnes* (2000)

(n) Acquiescence and its effects on the legal rights and obligations of States (2006)

(o) Conflicts between treaty regimes (2007)

(p) Hierarchy in international law (2011)

(q) The self-executing character of rules of international law (2012)

(r) Restatement of international law (2007)

B. Subjects of international law[c]

(a) Subjects of international law (1949)

(b) Criteria for recognition (1949)

(c) Recognition of Governments (1949)

(d) Obligations of territorial jurisdiction (1949)

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[a] The list should be read together with the working paper on the review of the list of topics established in 1996 in the light of subsequent developments (A/CN.4/679).

[b] Ibid., paras. 7-16.

[c] Ibid., paras. 17-20.

(e) The territorial domain of States (1949)

(f) Independence and sovereignty of States (1962)

(g) Statehood (1971)

(h) The international personality of international organizations (1970)

(i) The right of a State, in particular a new State, to determine, to implement and to perfect in its political form, socially and economically, in conformity with its professed ideology and to take all necessary steps to accomplish this, e.g. decolonization, normalization, nationalization, and also steps to control all its natural resources and to ensure that those resources are utilized for the interests of the State and the people (1970)

(j) The right of every State to take steps which, in its opinion, are necessary to safeguard its national unity, its territorial integrity and for its self-defence (1970)

(k) The question of recognition of Governments and belligerency (1971)

(l) The capacity of international organizations to espouse international claims (1971)

(m) Representative Governments (1996)

(n) Criteria for statehood (1996)

(o) International organizations as international subjects of law (1997)

(p) Recognition of States (1998)

(q) Non-intervention and human rights (1998)

(r) Subjects of international law (2007)

(s) Principles on border delimitation (2010)

C. Succession of States and other legal persons[d]

(a) Succession of States in respect of membership of, and obligations towards, international organizations (1996)

(b) "Acquired rights" in relation with State succession (1996)

(c) Succession of international organizations (1996)

(d) Treaties with international organizations in case of the succession of States (1998)

(e) Nationality of legal persons in relation to the succession of States (1999)

(f) Impacts of State succession on membership in international organizations (2010)

(g) Succession of States with respect to State responsibility (2013)

[d] Ibid., paras. 21-24.

D. State jurisdiction/immunity from jurisdiction[e]

(a) Recognition of acts of foreign States (1949)

(b) Jurisdiction over foreign States (1949)

(c) Jurisdiction with respect to crimes committed outside national territory (1949)

(d) Territorial domain of States (1949)

(e) The obligations of international law in relation to the law of the State (1949)

(f) Conflicts between treaties and domestic law, especially national constitutions (1970)

(g) The territory of another State (1971)

(h) Jurisdictional immunities with respect to armed forces stationed in the territory of another State (1971)

(i) Immunities of foreign States and bodies corporate (1972)

(j) Extraterritorial application of national legislation (1992)

(k) Immunities from execution (1996)

(l) Jurisdiction relating to public services (*compétences relatives aux services publics*) (1996)

(m) Universal jurisdiction in civil matters (2004)

E. Law of international organizations[f]

(a) General principles of law of the international civil service (1996)

(b) International legal personality of international organizations (1996)

(c) Jurisdiction of international organizations (implied powers, personal jurisdiction and territorial jurisdiction) (1996)

(d) The legal status of international organizations, and the different types of organization (1971)

(e) The representation of States in their relations with international organizations (1998)

(f) Model rules of a decision-making procedure for international conferences and conferences of parties to multilateral conventions (2011)

[e] Ibid., paras. 25-28.
[f] Ibid., paras. 29-30.

F. Position of the individual in international law[g]

(a) Law of nationality (1949)

(b) Right of asylum (1949)

(c) Extradition (1949)

(d) Jurisdiction of international courts and organizations with special reference to the plea of exclusion by the domestic jurisdiction in relation to questions affecting human rights (1970)

(e) Problems which arise owing to differences between the nationality laws applied by various countries (in particular as regards the conditions under which nationality may be accorded) (1971)

(f) Multiple nationality and other questions relating to nationality (1971)

(g) The refugee problem (1990)

(h) A new generation of human rights (1990)

(i) Rights of national minorities (1991)

(j) Law concerning international migrations (1992)

(k) International law relating to individuals (1996)

(l) Human rights and defence of democracy (1996)

(m) Human rights safeguards in the extradition process (1997)

(n) Principles of an international information order (1997)

(o) Mass exoduses of people under threat of death (1997)

(p) Human cloning and genetic manipulation (1997)

(q) The law relating to the treatment of aliens (1999)

(r) Non-discrimination in international law (2000)

(s) The position of the individual in international law (2000)

(t) Humanitarian protection (2000)

(u) The international legal consequences of violations of human rights (2000)

(v) International protection of persons in critical situations (2003)

(w) Responsibility to protect (2004, 2005)

(x) The rights of individuals arising from international responsibility (2013)

G. International criminal law[h]

(a) Jurisdiction with regard to crimes committed outside national territory (1949)

(b) Piracy *iure gentium* (1971)

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[g] Ibid., paras. 31-37.

[h] Ibid., paras. 38-39.

(c) Attacks on diplomatic agents and others to whom the receiving State owes a duty of special protection under international law (1971)

(d) International crimes other than those referred to in the Code of Crimes against the Peace and Security of Mankind (1996)

(e) Legal aspects of corruption and related practices (2000)

(f) Jurisdictional aspect of transnational organized crime (2000)

(g) Internet and international law (2008)

H. Law of international spaces[i]

(a) International bays and international straits (1967)

(b) Air piracy (1971)

(c) Pollution of international waterways (1972)

(d) Global commons (1992)

(e) The common heritage of mankind (1996)

(f) Transboundary resources (1996)

(g) Common interest of mankind (1996)

(h) The law of maritime delimitation (2012)

I. Law of international relations/responsibility[j]

(a) Question of whether extinctive prescription forms part of international law (1949)

(b) Prohibition of abuse of rights (1949)

(c) Functional protection (1996)

(d) International representation of international organizations (1996)

(e) Damages (1998)

(f) Remedies (1998)

(g) Revision of the Vienna Convention on Diplomatic Relations, 1961, with a view to providing, inter alia, for the question of insolvencies of embassies and their staff (1998)

(h) Consular functions (2010)

(i) Duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (2014)

[i] Ibid., paras. 40-45.
[j] Ibid., paras. 46-47.

J. Law of the environment[k]

(a) Law of the environment (1971)

(b) Legal aspects of the protection of the environment of areas not subject to national jurisdiction ("global commons") (1991)

(c) Protection of the environment (1990)

(d) Rights and duties of States for the protection of the human environment (1992)

(e) Feasibility study on the law of environment: guidelines for international control for avoidance of environmental conflict (2000)

(f) The precautionary principle (2000)

(g) The poiluter pays principle (2000)

K. Law of economic relations[l]

(a) Economic and trade relations (1971)

(b) The rules governing multilateral trade (1970)

(c) Legal conditions of capital investment and agreements pertaining thereto (1993)

(d) International law of economic relations (1990)

(e) The international legal regime of investments (1990)

(f) Legal aspects of contracts between States and foreign corporations (1990)

(g) Legal aspects of economic development (1990)

(h) The international legal regulation of foreign indebtedness (1991)

(i) The legal conditions of capital investment and agreements pertaining thereto (1991)

(j) Institutional arrangements concerning trade in commodities (1991)

(k) International legal problems connected with privatization of State properties (1996)

(l) Foundations of investment law (1997)

(m) Foreign investment (1997)

(n) Trade and investments (1997)

(o) Parent/subsidiary relations (1998)

(p) State contracts (1998)

[k] Ibid., paras. 48-49.
[l] Ibid., paras. 50-51.

L. Law of armed conflicts/disarmament[m]

(a) Prohibition of war (1962)

(b) Law of war and neutrality (1962)

(c) Prohibition of the threat or use of force (1971)

(d) The notion of "armed conflict" (1971)

(e) The effects of armed conflict on the legal relations between States (1971)

(f) Issues relating to internal armed conflicts (1971)

(g) The status and protection of specific categories of persons in armed conflicts (1971)

(h) The prohibition and limitation of the use of certain methods and means of warfare (1971)

(i) Updating of rules relating to armed conflicts and protection of the civilian population (1990)

(j) Legal aspects of disarmament (1991)

(k) Legal mechanisms necessary for the registration of sales or other transfer of arms, weapons and military equipment between States (1992)

(l) General legal principles applicable to demilitarized and/or neutral zones (1996)

(m) General legal principles applicable to armed sanctions under Chapter VII of the Charter of the United Nations (1996)

(n) Good-neighbourliness (1997)

(o) Law relating to international peace and security (1997)

(p) Economic sanctions (1998)

(q) The law of collective security (1999)

(r) Recourse to force by States Members of the United Nations and/or regional organizations under delegation of authority pursuant to Chapter VII of the Charter of the United Nations (2005)

(s) The pre-emptive use of force in international law (2005)

(t) The legal consequences arising out of the use of private armies in internal conflicts (2006, 2007)

(u) The legal consequences arising out of the involvement of multilateral corporations in internal conflicts (2006, 2007)

(v) The legal consequences arising out of the involvement of security agencies in internal conflicts (2006, 2007)

(w) The application of international humanitarian law to non-State armed groups in contemporary conflicts (2011)

[m] Ibid., paras. 52-53

M. Settlement of disputes[n]

(a) Pacific settlement of international disputes (1949)

(b) More frequent recourse to arbitral and judicial settlement (1962)

(c) Obligatory jurisdiction of the International Court of Justice (1962)

(d) Enforcement of international law (1962)

(e) Questions of international legal procedure, such as model rules for conciliation (1968)

(f) Drawing up the statute of a new United Nations body for fact-finding in order to assist the General Assembly in its consideration of that question (1968)

(g) Arrangements to enable international organizations to be parties to cases before the International Court of Justice (1968)

(h) Review of all the established machinery for the settlement of international disputes (1970)

(i) International commissions of inquiry (fact-finding) (1991)

(j) Mediation and conciliation procedures through the organs of the United Nations (1996)

(k) Model clauses for the settlement of disputes relating to the application or interpretation of future codification conventions (1996)

(l) Means and methods for the international settlement of disputes (1997)

(m) Evidence (1998)

(n) Multiple jurisdictions in international law (1998)

(o) Scope and content of the obligation to settle international disputes peacefully (2005)

(p) Model dispute settlement clauses for possible inclusion in drafts prepared by the Commission (2011)

(q) Access to and standing before different dispute settling mechanisms of various actors (States, international organizations, individuals, corporations, etc.) (2011)

(r) Competing jurisdictions between international courts and tribunals and declarations under the optional clause, including the elaboration of model clauses for inclusion therein (2011)

(s) Improving procedures for dispute settlement involving international organizations (2011)

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[n] Ibid., paras. 54-58.